

## Artículo de investigación

**Regulation of marriage relations by contract**

Договірне регулювання шлюбних відносин

**Regulación de las relaciones matrimoniales por contrato**

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The urgency of the article is the need to regulate the issue of marriage contracts in Ukraine. The object of study of this article was the family relationship arising from the marriage contracts. During the study, the following research methods were used by the authors: analysis, synthesis, induction, deduction, etc. The article analyzes the Ukrainian legislation and foreign experience in marriage contracts.

The authors concluded that marriage contract is primarily intended to strengthen the family institution, allowing more fully to take into account the interests of each spouse, reduce the number of disputes and conflicts between them, and in the case of divorce and division of property – to solve this more civilized way.

**Keywords:** Marital legal relations, marriage contracts, civil contracts, family law.

**Анотація**

Актуальність статті полягає у необхідності регулювання питання укладання шлюбних контрактів в Україні. Об'єктом дослідження даної статті стали сімейні правовідносини, що виникають з приводу укладання шлюбних контрактів. При написанні дослідження були використані наступні методи дослідження: аналіз, синтез, індукція, дедукція тощо. В статті було проаналізовано законодавство України та закордонний досвід з питання укладання шлюбних контрактів.

Авторами був зроблений висновок про те, що шлюбний договір в першу чергу призначений для зміцнення сімейного інституту, що дозволяє більш повно враховувати інтереси кожного з подружжя, зменшує кількість спорів і конфліктів між ними, а у разі розлучення і поділу майна – допомагає вирішити це питання більш цивілізовано.

**Ключові слова:** шлюбні правовідносини, шлюбний договір, цивільний договір, сімейне право.

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## Resumen

La urgencia del artículo es la necesidad de regular el tema de los contratos de matrimonio en Ucrania. El objeto de estudio de este artículo fue la relación familiar derivada de los contratos matrimoniales. Durante el estudio, los autores utilizaron los siguientes métodos de investigación: análisis, síntesis, inducción, deducción, etc. El artículo analiza la legislación ucraniana y la experiencia extranjera en los contratos matrimoniales.

Los autores concluyeron que el contrato matrimonial está destinado principalmente a fortalecer la institución familiar, permitiendo tener más en cuenta los intereses de cada cónyuge, reducir el número de disputas y conflictos entre ellos, y en el caso de divorcio y división de propiedad, a Resuelve este camino más civilizado.

**Palabras clave:** Relaciones matrimoniales, contratos matrimoniales, contratos civiles, derecho de familia.

## Introduction

Regulation of marital legal relations by the contracts has the purpose of dispositive regulation of marital legal relations. The analysis of literature and family law has established that marriage relationships can be regulated by concluded agreements between family members related to one another, in particular in the case of marital legal relationships, rights and/or agreements between parents and children and between wife and husband (Article 9 of the Family Code of Ukraine) This indicates that family-legal and marriage-legal agreements may arise between these parties in marital relations.

Accepting the definition, one should pay attention to the fact that there are indeed a number of contracts concluded between family members and legal entities, as well as guardianship and guardianship agencies, although aimed at protecting and ensuring the interests of the family, including children, can not be considered as family-legal agreements, because in the case of agreements with the guardianship and guardianship bodies concerning the maintenance and upbringing of the child, with legal entities concerning the protection of the rights of the child, spouses, parents, brothers, and sisters, etc., the authorities of guardianship and care and legal entities do not acquire Family Rights and Responsibilities.

## Methodology

The authors of the article used general scientific methods, as analysis, synthesis, induction, deduction, etc.

Among the special scientific methods used in the course of the work, one should name the method of system research, the method of comparative

law, the method of complex analysis and the method of legal modeling.

Thus, with the help of the method of systematic research, the special legal nature of the institute marriage contracts was discovered.

The method of comparative law allowed to reveal similar and distinctive features of the marriage contracts in Ukraine and foreign countries.

The method of complex analysis made it possible to analyze the peculiarities of the Institute of marriage contracts in Ukraine and foreign countries.

## Analysis of recent research

Scientists determine that family law contracts are agreements on the establishment, modification, and termination of family rights and obligations, concluded by individuals - members of the family, which are related to family relationships. Some scholars, in particular, T. Bodnar (2005), S. Brodovskiy (2005), S. Gopanchuk, O. Dzera (1978), O. Kokhanovskaya, R. Majdanyk (2012), Z. Romovskaya and others believe that family-law contracts should not be regarded as proper all contractual agreements stipulated by the Family Code of Ukraine. Scientists attribute their position to the difference between the subjective structure and the legal nature of the treaties.

## Presentation of key research findings

It should be noted that the contract – both family-legal and marriage-legal agreements – can be called a transaction, because the transaction - lawful, that is, not prohibited by law, the volitional action of the subject of civil legal relations, aimed at establishing, changing or termination of civil rights and responsibilities (Yesipov, 2005; Zvenygorodskaya, 2005; Zlobyna 2001). The same applies to family legal relationships when entering into an agreement,

which also provides for the establishment of rights and responsibilities, but - family.

Civil society – is a unique system of interaction between social individuals, social groups, layers and strata, which balances the vectors of its components (Kharytonov, Kharytonova, Tolmachevska, Tklich, & Fasii, 2019). The analysis of literature has established that for the legal regulation of family law contracts a number of requirements should be observed, namely: when entering into family-legal agreements, their content should not contradict the provisions of the legislation; the subjects - the parties to the family law agreement - must have some civilian capacity; the presence of their will by each of the parties to the family law agreement; the commission of a legal form in accordance with the provisions of the law; direction of the transaction due to its legal consequences; contracts are concluded by parents or guardians in the interests of the child.

The next position, which was determined by law and scholars, is the recognition of family-legal transactions invalid in case of breach of the requirements of the concluded agreements and if the concluded contracts contravene the requirements of legislative acts. Family-law contracts can be null and void. Invalid contracts are recognized by the provisions of the legislation (Part 2 of Article 215 of the Civil Code of Ukraine), while the agreements declared invalid by the legislative acts (Part 3 of Article 215 of the Civil Code of Ukraine) are recognized as the disputed, and, therefore, the court can determine the insolvency (invalidity) of such agreements. Civil law defines the general legal consequences of the recognition of a void act, which also belongs to family law contracts. Such consequences include: the return of all received under an invalid agreement, compensation for damage caused by the invalid agreement, as well as the possibility of compensation incurred in the event of a void transaction, moral damage.

The foregoing, by analogy, can be applied to marriage and legal agreements, because the latter are similar to family law contracts by legislative definition, partly by the subject structure and under the terms and procedure of conclusion and legal consequences, including legal consequences in case of recognition of the transaction as invalid.

In the light of the above and based on the analysis made, it is considered appropriate to define the concept of "family law contracts" and

their classification, to provide a general definition of the concept of "marriage and legal contracts". Marriage and legal agreements are agreements between spouses, persons who are in actual marital relations - concubinatus, persons who are in a relationship as civil partners, persons who are in a religious marriage, between parents and children, adopted and incarcerated, aimed at Settlement of family legal relations in relation to the onset and termination of marriages and similar to them in essence of rights and duties, as well as their changes.

The marriage contract in modern Ukraine is not as widespread as in foreign countries, but it is a part of the current legislation and has both pros and cons. Marriage contract, unlike other treaties, is inextricably linked with the personality of its participants, and therefore it can be concluded neither with the help of a legal representative nor by power of attorney, only by persons who enter into a marriage or have already entered into a marriage. However, when making a marriage contract, it is advisable to use professional legal assistance, which will allow you to pay attention to certain points. It should be noted that for the first time the marriage contract was enshrined in French civil law in 1804. Abroad, a marriage contract has long been the norm provided by civilized relations. And the conclusion of marriage contracts is an ordinary matter, especially in the case of repeated marriages.

The marriage contract regulates the spouses' relations considered to the property. Such a contract defines the property relations of the spouses (rights and obligations regarding property) when entering into a marriage and in the event of termination of the marriage (Antoshkina, 2005). It is important for a spouse or future spouse to identify the property of particular material value, in particular, the spouses indicate which property will be the personal property of each of them, and which is a joint property of common ownership. For example, if a marriage contract states that real estate (house, apartment, cottage, land, etc.) belongs to the wife on the right of private property, then in the event of a divorce, the husband will have no right to claim for the specified immovable property owned by his wife.

Sometimes a marriage contract can transfer property to one another that belonged to him/her before the marriage, that is, before the marriage relationship (in the event that such an item is not included in the text of the marriage contract, then in the divorce, this property will remain for

him/her). Also, the spouse needs to know in advance the fate of things that it will acquire in the future and distribute not only who they will belong to, but whom will serve them (this applies to real estate, cars and other property that needs additional maintenance, including payment of taxes).

Most scholars emphasize the practical experience of foreign countries, including EU countries, in covering and studying the issues of legal regulation of marriage contracts, that is, the fact that a marriage contract is not always justified for relations between spouses, in particular in resolving disputed property issues. Although the family law of Ukraine defines the legal structure of a marriage contract, it does not oblige those who have married or are in actual family relationships to conclude such contracts with each other. The conclusion of a marriage contract is voluntary, and the law empowers the spouses to independently indicate their property relations when making such an agreement. If the married couple has not entered into a marriage contract, then all property disputes between spouses are resolved and governed by law. Consequently, it follows from the established existence of the legal regime of the property of the spouses and the contractual regime of the property of the spouses.

With the help of the analysis of the Family Code of Ukraine, one can draw attention to the absence of the definition of the concept of "marriage contract", although the Chapter 10 of the Family Code of Ukraine is devoted to the institution of a marriage contract.

A marriage contract is considered appropriate to mixed agreements that are complex. To him, each spouse may include any conditions that may consist in the content of certain types of contracts. Parties to the marriage contract may be married as both spouses who have already registered marriage and those who will only be married in the future, that is, such persons may be considered eligible and persons who have actual marital relations.

The family law of EU member states stipulates that a marriage contract is a contract of brides or persons who are already registered in a marriage, which regulates and determines the personal and property rights and duties of the spouses, as well as those who terminated the marriage. Thus, as it is seen, the family law of foreign countries, providing the definition of a marriage contract and its legislative consolidation, provides for the possibility to regulate both property and personal

relations of persons who are in marital relations, and who only intend to enter into these relations. It should be noted that on the way to European integration in Ukraine, measures are being taken to positively resolve the issues of settling property and personal relations of spouses through marriage contracts, taking into account non-violations of human rights guaranteed by the Constitution of Ukraine (Myxalnyuk, 2014; Polozov, 2002; Reutov, 2003).

Thus, analyzing the opinions of scientists who have noted in many cases that the marriage contract should be considered due to a variety of civil contracts can disagree with their position and confidently determine that the marriage contract should be regarded as a kind of family law agreements, for he deals with marital property and non-property legal relations, its provisions and conditions are aimed to the implementation of rights and obligations of spouses, parents and children, persons who are in actual marital relations, including religions marriage and applied for marriage registration and making to protect these rights and duties and to determine the legal consequences in case of termination of marital relations or divorce.

By analyzing the family law of Ukraine, we establish that Part 1 of Art. 92 of the Family Code of Ukraine is determined a certain circle of parties to the marriage contract, which according to the provisions can only be persons who have filed an application for registration of marriage or persons who are married, that is, spouses. Consequently, the party to the marriage contract can not be other persons, except certain persons. It also focuses on the conditions under which a marriage contract should not restrict the legal capacity and capacity of each spouse, that is, contain provisions restricting the right of one of the parties to work, the choice of profession, education, freedom of movement, etc. (Bilousov, 2016).

Marriage contract regulates three main types of property relations:

- a) The legal regime of property (Article 97 of the Family Code of Ukraine);
- b) The procedure for the use of housing (Article 98 of the Family Code of Ukraine);
- c) The right to maintenance (Article 99 of the Family Code of Ukraine).

The marriage contract is concluded on the property relations of the spouses (Part 1 of Article 93 of the Family Code of Ukraine) (Lyxolat, 2010; Lozova, 2007).

Spouses can not regulate their non-property rights and duties in relation to children through a marriage contract [205, p. 28]. Also, the contract can not contain conditions that place one of the spouses in an extremely unfavorable situation (to provide for the contract that all the marriage of property and income become the property of only one of the spouses). In addition, the marriage contract can not contain restrictions on issues such as voluntary marriage, marriage, welfare and development of children, etc.

It appears that the claim for compliance with the form of the contract is mandatory. Therefore, we are joining the opinion of those authors who consider such a requirement for the spouse to be obligatory. Then the rights of the spouse who are given the appropriate things will be protected more effectively.

The presumption of consent at the time of the conclusion of contracts does not deprive the right to file a claim for the recognition of such an agreement null and void. After all, according to Art. 4 of the Civil Procedure Code of Ukraine, any interested person has the right, in accordance with the procedure established by law, to apply to the court for the protection of an impugned or disputed right or interest protected by law.

Upon the recognition of an invalid agreement entered into by one of the spouses, questions may be raised as to the extent to which such an agreement is invalid, namely in full or in part of the spouse whose rights are violated.

The legal consciousness of many Ukrainian citizens has lately far behind the development of legislation, especially on the path of European integration, which, of course, affects the principles of building any legal relationship. If we draw attention to the relations between people who are built on the non-legal term "love", then their characteristic features are mainly the lack of a logical line of behavior, which, unfortunately, in the future can lead to negative consequences. In connection with this, it is proposed to introduce an agreement between the persons who are in actual marriage relations, a concession agreement, which will further facilitate the determination of the time of the occurrence of marital legal relations between persons who are in actual marriage relations, to resolve property

and non-property issues in the event of termination actual marital relationship.

In general, an agreement between a person in a religious marriage, an actual marriage or a civil partner must be similar to a marriage contract. Therefore, in accordance with the requirements of the Family Code of Ukraine, in such agreement parties may restrict themselves only to the principle of acquisition of property rights during co-residence. If it is established by law that during the stay in actual marital relations the property acquired jointly is considered as common property, then duplication of it does not make sense if the parties do not wish to separate the property that belonged to them before entering into the actual marital relationship.

However, unlike a marriage contract, which allows the separate property regime of a spouse, in contracts concluded between persons who are in concubinage or are civil partners, there is no specification in the rules of the law regarding the rights and obligations in actual marriage and civil partnership which parties can make a decision. However, in this case, the difference between unregistered relationships and registered relationships is lost. It seems that in a contract between actual marriages and civil servants it is impossible to allow the parties to determine in advance the shares in which one party would unreasonably receive more than the other, since such a transaction would be contrary to the principle equal rights of men and women and/or civil partners (men and men, women and women).

Consequently, summing up the above, it is noted that a marriage contract is a voluntary agreement that establishes the right of those entering (or those who have already entered) into marriage, property acquired in marriage or before marriage, as well as the distribution of the burden of financial cost of marriage. The spouses must enter into a marriage contract by agreement with an understanding of what legal consequences can occur in the event of termination or termination of marriage, including for their successors. The provisions of the Family Code of Ukraine permit the conclusion of a marriage contract almost every time: before marriage, at the time of entry and after the marriage.

A contract signed by persons before their marriage will come into force only when the persons who have concluded it will become married. A marriage contract should be in writing form and is a subject to a notarial certificate, without observing these conditions it will be



invalid, in this case, no legal consequences for the spouses will arise.

Today Ukrainian legislation provides quite wide and flexible possibilities for the compilation and conclusion of marriage contracts that are individually suited for each married couple. A contract may provide for different regimes for different parts of the property, including property acquired before marriage, and even do not use the property. A marriage contract in Ukraine can only regulate property relations, which essentially distinguishes Ukrainian legislation in this area from the legislation of many other countries.

In most European countries, the marital contract may have the widest responsibilities of the spouses. The Family Code of Ukraine does not provide possibilities for such clauses of a marriage contract, any clauses of a marriage contract concerning the distribution of home duties, the upbringing of children, conducting of the economy and any other rights and duties of the spouses will not be legally valid. In addition, the marriage contract can not: limit the legal capacity and capacity of the spouses, their right to apply to the court for protection; to regulate the rights and responsibilities of spouses concerning children; restrict the right of the disabled, needy husband to receive maintenance; contain other conditions that put one of the spouses at a disadvantage or conflict with family law.

A marriage contract may be changed or terminated at any time with the consent of the spouse. An agreement on the modification or termination of a contract shall be made in writing and shall be subject to a notarial certificate.

Unilateral refusal to execute a marriage contract is not allowed, however, at the request of one of the spouses, the marriage contract can be terminated in court on the grounds and in the manner established by the Family Code of Ukraine, in particular in case of material breach of contract by the other party or substantial change in its terms.

To conclude a marriage contract or not is a personal affair of a family. In the West, especially in many European Union countries, a rare wedding is done without a marriage contract.

For comparison: in 2007 in foreign Europe and the USA, at least 70% of married couples signed official contracts in 2007, 60% of marriages were contracted by the United States in 2000, but for the quarter of a century before, in those same US marriages were only 1%.

## Conclusions

In modern conditions, given the tendency to fall in the authority of the family institution, the increase in the number of divorces, it is safe to assert that the spouses always have a choice: they can build their property relations both on a legal and on a contractual basis in connection with the fact that along with tried and tested ways of regulating family relations appeared more modern – a marriage contract. Given, undoubtedly, huge experience in regulating property relations between spouses in foreign countries, the Ukrainian couple still have to verify the practical value of the effectiveness of the marriage contract. This will take place as individuals intending to marry, as well as the spouses, will realize the true meaning of the marriage contract, its essence, and purpose.

Thus, we can conclude that the marriage contract is primarily intended to strengthen the family institution, allowing more fully to take into account the interests of each spouse, reduce the number of disputes and conflicts between them, and in the case of divorce and division of property – to solve this more civilized way.

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